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MICHAEL RODAK,

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-324

ERNST RUSS STEAMSHIP CO.,
Petitioner,

vs.

JOHN MATTHEWS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the
United States Court of Appeals
for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on August 20, 1979.

OPINION BELOW

There is no opinion from the trial court. The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported, but it is set forth in the Appendix, pp. A-1 to A-13.

JURISDICTION

On August 20, 1979, the Court of Appeals entered its judgment affirming the district court's judgment for the plaintiff. The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED

Three questions are presented concerning standards for determining whether a shipowner has been negligent under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b):

1. Whether it is proper to instruct a jury that a shipowner is liable to the longshoreman if the shipowner's act or omission played any part, no matter how small, in causing plaintiff's injury, or whether such an instruction should be limited to those Federal Employers' Liability Act cases and Jones Act cases to which it has historically been restricted;

2. Whether it is proper to instruct a jury that a shipowner has a duty to take remedial action with respect to all unreasonably dangerous conditions of which it has actual or constructive knowledge in order to protect employees of an independent contractor stevedore;

3. Whether a shipowner may be held negligent for permitting a conspicuously defective ladder to be left in an accessible place when one longshoreman's injuries are caused by another longshoreman's use of the ladder without following the safety precautions imposed upon stevedore contractors (but expressly not upon shipowners) by federal regulations.

STATUTE AND REGULATION INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. § 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

29 C.F.R. Part 1918, Safety and Health Regulations for Longshoring, § 1918.25(f):

> Portable straight ladders used by employees for any purpose not otherwise specifically covered by this part shall be of adequate strength and lashed, blocked, or otherwise secured against shifting or slipping.

STATEMENT OF THE CASE

In late 1976, the Mid-States Stevedoring Corporation assigned a number of its longshoremen employees to unload a cargo of containers from a vessel owned by petitioner Ernst Russ Steamship Company. The unloading operation was being conducted entirely by Mid-States Stevedoring and its employees. John Matthews, a Mid-States longshoreman, was on board the vessel atop one cargo container. He had just finished hooking an adjacent container to the cables from a shoreside crane when another Mid-States longshoreman picked up a ladder he found in the hold. The ladder was "lopsided . . . [with] its right side bent", "[t]he left safety foot was missing" entirely, making that leg shorter than the other, and "the right safety foot was in bad condition". (Appendix, pp. A-3, A-4; Transcript, pp. 100, 169, 200-201, 205.)

Even though Mid-States supervisors knew of the defective ladder, warned against its use (Appendix, p. A-8 n.4; Transcript pp. 404-405, 420-421), and actually provided another ladder which the longshoremen had been using for several hours (Appendix, p. A-8 n.4), the other Mid-States longshoreman, in his "hurry to get [Matthews] . . . down" (Appendix, p. A-3), placed the defective ladder against the container for Matthews to climb down. The Mid-States longshoremen failed to block or hold the ladder as required by safety regulations applicable to stevedore companies (29 C.F.R. § 1918.25(f)). When Matthews stepped onto the top of the ladder it "ran out from under" him; he fell and was injured (Transcript, p. 32).

Matthews filed an action invoking the diversity jurisdiction of the United States District Court for the Northern

District of Illinois against the vessel and its owner, the Ernst Russ Steamship Company, based upon negligence. The district court entered judgment for plaintiff upon a jury verdict and the Court of Appeals for the Seventh Circuit affirmed. The Court of Appeals rejected shipowner's argument that a directed verdict or a judgment n.o.v. should have been granted because of the known and obvious nature of the ladder's defective condition, stating: "Even if the jurors believed that the condition of the ladder was open and obvious to plaintiff's co-employees and therefore that they were negligent in attempting to use it, that would not mitigate the shipowner's negligence" (Appendix, p. A-6). The recent opinion of this Court in *Edmonds v. Compagnie Generale Transatlantique,* No. 78-479 (June 27, 1979), was cited as authority for this proposition (Appendix, p. A-7).

The Court of Appeals also asserted that a jury finding that Matthews was not contributorily negligent meant the ladder could not have been openly and obviously defective (Appendix, p. A-8). This distinctly different and independent factual determination was made even though the Court of Appeals was aware there was uncontroverted testimony at the trial below that the longshoremen's supervisors knew of the presence of the defective ladder and failed to prevent its use (Appendix, p. A-8 at n.4; Transcript pp. 404-405, 420-421).

Two issues regarding jury instructions were presented to the Court of Appeals. First, whether it was correct to give the jury the instructions typically given under the Federal Employers Liability Act (45 U.S.C. §§ 51-59) and under the Jones Act (46 U.S.C. § 688), according to which

the jury was permitted to find defendants liable if their act or omission played any part, no matter how attenuated, in causing plaintiff's injury (Appendix, pp. A-9, A-10).[1] The Court of Appeals, once gain relying on this Court's recent opinion in *Edmonds v. Compagnie Generale Transatlantique*, No. 78-479 (June 27, 1979), found the instructions proper (Appendix, p. A-10).

Finally, the Court of Appeals approved a jury instruction which imposed a duty on the shipowner to take remedial action as to all dangerous conditions aboard the ship, without regard to whether they were known and obvious or under the control of the only party charged by the safety regulations with a duty to eliminate conditions dangerous to longshoremen, the stevedoring contractor. (Appendix, p. A-11). For this holding, the court relied on *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480, 487 n.6 (9th Cir. 1979) (Petition for Certiorari filed September 26, 1979).

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[1]The instructions given the jury (Transcript, pp. 665-66) are taken verbatim from 3 Devitt & Blackmar, Federal Jury Practice and Instructions (3d ed. 1977), Chapter 94 (referring to FELA and Jones Act cases), § 94.13, as follows:

> For purposes of this action injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in the case that any negligence of the defendant contributed in any way toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was caused by the defendant's act or omission.
>
> Stated another way, an act or omission is the cause of injury or damage if the injury or damage would not have happened but for the act or omission, even though the act or omission combined with other causes.

REASONS FOR GRANTING THE WRIT

The Court should grant the Writ of Certiorari because the Court of Appeals has:

1. Misinterpreted and misapplied a recent decision of this Court to support a decision contrary to the same decision of this Court and decisions on matters not decided by this Court, and further to reach conclusions in conflict with those of other circuits;

2. Rendered a decision which is in conflict with applicable decisions by this Court;

3. Rendered a decision in conflict with decisions in the same matter of six other Courts of Appeals, those of the First, Second, Third, Fourth, Fifth and Ninth Circuits; and

4. Rendered decisions on important questions of law, which have not been, but should be, decided by this Court.

ARGUMENT

A. Misinterpretation And Misapplication Of This Court's Opinion In Edmonds v. Compagnie Generale Transatlantique

This Court in its Opinion of June 27, 1979 in *Edmonds v. Compagnie Generale Transatlantique,* No. 78-479, decided the question whether, in a case of joint negligence of the shipowner, the stevedore contractor and the injured longshoreman, the shipowner's liability for the damages of the longshoreman could be limited to its own percentage of the total negligence involved. While the Court acknowledged some of the policy and background of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation

Act, it decided nothing about the circumstances giving rise under those Amendments to a duty of care toward the longshoremen and did not directly decide anything about the standard of causation in longshoremen's negligence suits; certainly it did not decide to change the standards previously followed.

In the face of these circumstances the Court of Appeals has made amazing use of this Court's *Edmonds* opinion, citing it as authority to increase the burdens of liability upon shipowners in several ways: twice by approving formulas increasing the frequency of occasions on which a duty will be imposed upon the shipowner and once by approving an instruction which will increase the number of occasions on which causation of an injury will be found. (The causation instruction is apparently directly contrary to considerations explicitly recognized in the *Edmonds* opinion.) The Court of Appeals' misuse of *Edmonds* is explained separately below as to each instance.[2]

B. Conflict With This Court's Opinion In Edmonds As to The Jury Instruction on Causation

The Court of Appeals approved a jury instruction on causation which is contrary to the standard of causation set forth in *Edmonds*. While *Edmonds* did not directly present any issues relating to causation, this Court pointed out that the pre-1972 rule it retained was consistent with the general rule requiring that a defendant's negligence be "a substantial factor in causing . . . the incident." Slip op. at 3. The Court also noted that the inequity of requiring a 1% negligent shipowner to pay 100% of the damages will

[2]Points B, C and D below.

be mitigated by realistic decisions on the causation issue: "In many cases, of course, the shipowner whose act or omission contributed only a very small percentage of the total negligence will avoid liability on the ground of lack of causation." Slip op. at 8 n.15; see also *id.* at 15 n.30.

The instruction approved by the Court of Appeals, however, "permitted the jury to hold defendants liable if their act or omission played any part, no matter how small, or contributed in any way in causing plaintiff his injury". Appendix, p. A-10.[3] Such an instruction imposes liability on a defendant whose negligence is a remote cause, contrary to the recognition in *Edmonds* that a standard of "substantial" causation is appropriate.

This jury instruction is in conflict not only with the *Edmonds* case, but also with the clearest direction Congress provided regarding content of "negligence" suits under the 1972 Amendments. The injured longshoreman is to be "in the same position he would be in if he were injured in non-maritime employment ashore," and he is not to be endowed "with any special maritime theory of liability . . . under whatever judicial nomenclature it may be called such as 'unseaworthiness', 'non-delegable duty', or the like."[4] The jury instruction approved by the Court of Appeals is one historically given in Federal Employers' Liability Act and Jones Act cases, in which the imposition of liability when the defendant's negligence contributes "even the slightest

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[3]Defendant requested and was denied an instruction requiring that the shipowner's negligence be a substantial factor. (Transcript pp. 532, 539; Clerk's Record, Item 33; Appendix, p. A-10.)

[4]Senate Report No. 92-1125, 92d Cong., 2d Sess. 10 (1972); House of Representatives Report No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. and Ad. News 4698, 4703.

degree" is a response to Congress' decision to impose extraordinary burdens to ensure that railroad operators and shipowners provide their own employees with a safe place to work.[5] The standard contained in the instruction is different from the common law standard,[6] so different in fact that it is not given in relation to a seaman's unseaworthiness claim, but just on his Jones Act claim.[7] Such a burden was not imposed before the 1972 Amendments and is entirely inappropriately placed upon a shipowner after the 1972 Amendments.

C. Conflict As To The Formulation Of The "Known and Obvious" Standard

The decision of the Court of Appeals paid lip service to the application of the "known and obvious" standard by the apparent approval of a jury instruction incorporating it. (Appendix, pp. A-4 & A-5). When the court discussed the application of the known and obvious standard, however, it found the shipowner negligent despite the openness and obviousness of the defect in the ladder, and in so doing it actually abandoned the standard it had seemed to approve: "Even if . . . the condition of the ladder was open and obvious . . . , that would not mitigate the shipowner's negligence." (Appendix, p. A-6). In place of the open and obvious standard, the Court of Appeals appears to have held that the shipowner's liability flows from the existence of any danger and that the shipowner is liable for all injuries

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[5] Rogers v. Missouri Pacific Ry., 352 U.S. 500 (1957); Coray v. Southern Pacific Co., 335 U.S. 520 (1948).

[6] Hausrath v. New York Central R.R., 401 F.2d 634, 637 (6th Cir. 1968).

[7] Litherland v. Petrolane Offshore Construction Services, Inc., 546 F.2d 129 (5th Cir. 1977); *cf.* Peymann v. Perini Corp., 507 F.2d 1318 (1st Cir. 1974).

caused by any danger, regardless of whether it was known or obvious, except insofar as plaintiff's negligence contributed:[8] "Also the jury specially found that plaintiff was not contributorily negligent. Accordingly we cannot accept defendants' argument that there was no liability on the ground that the condition of the ladder was open and obvious." (Appendix, p. A-6). The errors are compounded by the citation of *Edmonds* in support of these conclusions (Appendix, p. A-7), when *Edmonds*, of course, does not deal with the questions at all.

Matthews is one of several recent cases abandoning limits on the shipowner's duty,[9] and one of at least three to cite *Edmonds* as authority.[10] Since these cases are in conflict with almost all prior authority in the Courts of Appeals,[11] and since *Edmonds* did not decide these issues, the Court should review this trend now.

D. Conflicts As To The Rejection Of The Relevance Of The Shipowner's Relinquishment Of Control To The Stevedore

The opinion below cites this Court's opinion in *Edmonds* for the proposition that neither the shipowner's relinquishment of control of the job and the work area to the stevedore company nor the company's duty under the longshore regulations to provide safe ladders relieved the shipowner

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[8]Virtually the same standard is embodied in a jury instruction discussed in section E 1, below.

[9]Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979) (Petition for Certiorari filed September 26, 1979); Bachtel v. Mammoth Bulk Carriers, Ltd., 9th Cir. No. 76-3645, decided August 20, 1979 (Petition for Certiorari filed October 1, 1979); Lawson v. United States, 9th Cir. No. 77-2510, decided August 21, 1979.

[10]Bachtel v. Mammoth Bulk Carriers, Ltd., *supra* note 9; Lawson v. United States, *supra* note 9.

[11]See Section E2 and cases cited in note 17, below.

from a duty to affirmatively provide for the safety of the longshoremen. (Appendix, p. A-8.) The opinion reaches this result by misstating the *Edmonds* holding. *Edmonds* held that the stevedore company's negligence does not permit a reduction of the shipowner's damage where the shipowner has been found negligent; the opinion below asserts that *Edmonds* means the existence of a stevedore company's duty is not relevant to a determination whether the shipowner also retained control and a concomitant duty to plaintiff. The holding of the Court of Appeals not only unjustifiably cited *Edmonds*; it is in conflict with decisions from other Courts of Appeals which have found the relinquishment of control to be significant in determining whether the shipowner owed a duty.[13]

E. Conflicts As To Land-based Law On Whether A Duty Exists To Correct Known And Obvious Dangers

1. The Jury Instructions on Shipowner's Duty of Care

The court approved a jury instruction which imposes a duty on the shipowner to protect the longshoreman by taking "reasonable remedial action with respect to all unreasonably dangerous conditions of which it has actual or constructive knowledge." (Appendix, p. A-11.) The courts of appeals of other circuits, and that of the Seventh Circuit itself, have held to the contrary, recognizing that the duty to act arises not from the mere existence of danger, but

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[13] Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798, 1978 A.M.C. 1277 (2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978); Hurst v. Triad Shipping Co., 554 F.2d 1237, 1977 A.M.C. 1625 (3d Cir. 1977); Munoz v. Flota Merchante Grancolombiana, 553 F.2d 837, 1977 A.M.C. 843 (2d Cir. 1977); Briley v. Charente Steamship Co., 572 F.2d 498 (5th Cir. 1978); Wescott v. Impresas Armadoras, S.A., 564 F.2d 875, 1979 A.M.C. 930 (9th Cir. 1977).

from the existence of certain kinds of dangers: those which are not obvious[13] or under control of the stevedore company.[14]

2. Failure of the Court to Grant a Judgment N.O.V. in Reliance Upon the Santos Case

If the court below had applied a standard consistent with those applied in the vast majority of other court of appeals decisions, it would have directed a verdict for the shipowner or granted judgment n.o.v. Only one circumstance was cited to support the assertion that the shipowner had been negligent: "[T]he shipowner was negligent in allowing a defective ladder to be available where the Stevedore's employees were likely to make use of it." (Appendix, p. A-6.) Plainly and simply, the issue is whether a shipowner has a duty to eliminate every condition which could cause injury to a longshoreman, even a condition which can only be brought into play by the actions of the stevedore company in disregard of the obvious danger and in disregard

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[13] Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746, 1979 A.M.C. 999 (7th Cir. 1979); Lopez v. A/S D/S Svendborg, 581 F.2d 319, 1978 A.M.C. 1655 (2d Cir. 1978); Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 1978 A.M.C. 1920 (2d Cir. 1978); Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364, 1978 A.M.C. 826 (2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861, 1977 A.M.C. 1289 (2d Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 1976 A.M.C. 551 (2d Cir. 1976); Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978); Riddle v. Exxon Transportation Co., 563 F.2d 1103, 1978 A.M.C. 741 (4th Cir. 1977); Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757, 1976 A.M.C. 2048 (4th Cir. 1976); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 1978 A.M.C. 1647 (5th Cir. 1978); Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338, 1978 A.M.C. 2427 (5th Cir. 1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977).

[14] See cases cited in note 12, *supra*.

of the duties imposed on the stevedore contractor by the safety regulations governing the use of equipment.[15] The great majority of the decided cases under the 1972 Amendments have recognized that only the stevedore, not the shipowner, owes such a duty to longshoremen.[16] But the Court of Appeals, with a confusing and inaccurate description of the holdings in *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979) (Petition for Certiorari filed September 26, 1979, No. 79-512) (Appendix, pp. A-4 to A-7), relied on that case in upholding the denial of judgment n.o.v.

It then relied on the same decision again in upholding the jury instruction with respect to a duty to correct obvious dangers (Appendix, pp. A-11 and A-12). The Court of Appeals thus placed itself in conflict with the numerous cases, in at least five other circuits and its own, with which the *Santos* case is also in conflict.[17]

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[15] 29 C.F.R. § 1918.25 (f) provides:

> Portable straight ladders used by employees for any purpose not otherwise specifically covered by this part shall be of adequate strength and lashed, blocked, or otherwise secured against shifting or slipping.

[16] See cases cited at notes 12, 13.

[17] Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798, 1978 A.M.C. 1277 (2d Cir. 1978); Hickman v. Jugoslavenska Linijska Plovidba Rijeka, Zvir, 570 F.2d 449, 1978 A.M.C. 355 (2d Cir. 1978); Lopez v. A/S D/S Svendborg, 581 F.2d 319, 1978 A.M.C. 1655 (2d Cir. 1978); Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 1978 A.M.C. 1920 (2d Cir. 1978); Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364, 1978 A.M.C. 826 (2d Cir. 1978); Munoz v. Flota Merchante Grancolombiana, 553 F.2d 837, 1977 A.M.C. 843 (2d Cir. 1977); Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861, 1977 A.M.C. 1289 (2d Cir. 1977); Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 1976 A.M.C. 551 (2d Cir. 1976); Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979); Hurst v. Triad Shipping Co., 554 F.2d 1237, 1977 A.M.C. 1625 (3d Cir. 1977); Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978); Riddle v. Exxon Transportation Co., 563 F.2d 1103, 1978 A.M.C. 741 (4th Cir. 1977); Anuszewski v. Dynamic Mariners

F. Importance Of The Questions

The questions are important first because of their nature. It is clear from the history that Congress intended a major reform by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Its history also indicates a number of policy considerations to be given effect in the Act, such as increased reliance upon the predictability, regularity and adequacy of compensation benefits, the promotion of safety and the reduction of economic loss through legal proceedings. To describe the longshoreman's new and more limited rights against the vessel, the new subsection 905(b) provided but a single word of substance, "negligence", a term which has always been highly variable in content according to the circumstances. Thoughtful exploration and interpretation of its substance are needed if the section is to be given shape to implement the important policies of the Act.

The questions presented are important also because of the frequency with which they arise. The history of longshore injury cases in this Court and the number of them to be readily found in the law reports will remind the Court that longshoremen's suits against the shipowner are potentially, and actually, numerous. The numerous appellate court decisions cited in footnotes to the text above, concern-

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Corp., 540 F.2d 757, 1976 A.M.C. 2048 (4th Cir. 1976); Briley v. Charente Steamship Co., 572 F.2d 498 (5th Cir. 1978); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 1978 A.M.C. 1647 (5th Cir. 1978); Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338, 1978 A.M.C. 2427 (5th Cir. 1978); Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977); Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977); Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746, 1979 A.M.C. 999 (7th Cir. 1979); Wescott v. Impresas Armadoras, S.A., 564 F.2d 875, 1979 A.M.C. 930 (9th Cir. 1977).

ing the question of duty presented in this case, should go far to establish its importance.

The importance of reviewing and properly defining the scope of a shipowner's duty to longshoremen is magnified by the Court of Appeals' misuse of the opinion of this Court in *Edmonds v. Compagnie Generale Transatlantique,* No. 78-479 (June 27, 1979). That case decided only the issue of the amount of a shipowner's liability after it had been established that his negligence was the proximate cause of plaintiff's injuries. Yet here, the Court of Appeals inflates the holding in *Edmonds* to extend greatly the duty which the shipowner owes the longshoreman and virtually eliminate causation as a factor in determining a shipowner's liability. Since contribution between the shipowner and the stevedore employer has been forbidden by this Court[18] and indemnity is barred by statute,[19] the imposition of virtually unlimited and faultless liability for injuries to longshoremen only remotely caused by shipowners frustrates the reform goals of the 1972 Amendments under the guise of following a decision of this Court which, in fact, did not dictate that result.

RELATED CASES

The question of duty raised by this case is the same question raised in the Petitions for Certiorari filed in *Scindia Steam Navigation Co., Ltd., Petitioner v. Lauro de los Santos and Seattle Stevedore Co., Respondents,* No. 79-512, and in *Mammoth Bulk Carriers, Ltd., Petitioner v.*

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[18]Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 1952 A.M.C. 1 (1952).

[19]33 U.S.C § 905(b).

James D. Bachtel, Donna Bachtel and Twin Harbor Stevedoring Co., Respondents, No. 79-538.

CONCLUSION

For the foregoing reasons, we submit that this Court should grant a Writ of Certiorari to review the decision of the Court of Appeals and should consolidate the case for hearing with the other cases cited in which petitions for writs of certiorari are filed raising the same question of duty.

Respectfully submitted,

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Appendix A

APPENDIX

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Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

No. 78-2547

John Matthews,

Plaintiff-Appellee,

v.

Ernst Russ Steamship Company and M/V Tilly Russ, Etc.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-4640—George N. Leighton, Judge.

Argued June 13, 1979—Decided August 20, 1979

Before SWYGERT and CUMMINGS, Circuit Judges, and CAMPBELL, Senior District Judge.*

CUMMINGS, Circuit Judge. This diversity suit was brought by a longshoreman seeking $450,000 for an injury he incurred in unloading cargo from defendant Motor Vessel TILLY RUSS owned by co-defendant Ernst Russ Steamship Company. According to the complaint, on December 4, 1976, plaintiff was working aboard the TILLY

*The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

RUSS when it was moored at Navy Pier in Chicago. He alleged that when he was descending from a container on a ladder it gave way under his weight so that he was thrown eight feet to the lower deck of hatch 3, permanently fracturing his right foot's os calsis (heel bone). He charged that the ladder was part of the vessel's equipment and that defendants negligently failed to maintain the rubber heels at the base of the ladder. He claimed that he was exercising ordinary care at the time of the fall. In an amended complaint, plaintiff's wife was added as a co-plaintiff, and the ad damnum was increased to $600,000.

At the close of the evidence, the matter was submitted to the jury not only on the general verdict but also on special interrogatories under Rule 49(b) of the Federal Rules of Civil Procedure. The jury found that (1) defendant steamship company was negligent, (2) its negligence proximately caused plaintiff's injury,[1] (3) plaintiff was not guilty of contributory negligence, and (4) $180,000 would compensate him for his injury. Judgment for plaintiff was entered on the verdict. We affirm.

The evidence credited by the jury showed that on December 4, 1976, the Mid-States Stevedoring Corporation assigned plaintiff and other longshoremen to unload a cargo of containers in the No. 3 hatch of the TILLY RUSS. The vessel was loaded with containers from the floor of the lower hold to the top deck. The longshoremen would unload the containers by stepping from the upper deck to the tops of containers and hooking cables from the Steve-

[1] In so finding the jury necessarily rejected defendants' contention that the Stevedore caused the accident by prematurely moving the container from which plaintiff was descending.

dore's shore-side crane to the top of each container. When the longshoremen stepped off a container, the crane operator would lift it out of the ship to the pier. The longshoremen repeated this process with each container, working across and downward from the top to the bottom of the hold, unloading the containers in sequence. In their unloading work, the longshoremen used a ladder supplied by the Stevedore. This ladder was used by the longshoremen to descend from the top of each container after hooking a cable thereon.

When the longshoremen reached the bottom layer of containers in hold 3, there were five present: plaintiff, Orvey Ware, James Green, James Walton and Willie White. Plaintiff and one other longshoreman were on top of a container but the other three had already descended to the floor of the hold. Ware testified that he was in a hurry to get plaintiff and the other longshoreman down from the last two containers, one of which (container B) they had just hooked to cables from the shore-side crane. He noticed a metal ladder in the corner of the ship and placed it against the final container (container A) to be removed so that plaintiff could come down. The Stevedore's ladder was also leaning against that container. (See plaintiff's Exh. 59.) When plaintiff used the second or ship's ladder to descend from container A he and the ladder fell to the bottom deck of hatch 3.[2] The left safety foot was missing from the ladder, the right safety foot was in bad condition, the ladder itself was lopsided, and its right side

[2]Defendants contend that it was not established that the second ladder belonged to the ship. However, it clearly did not belong to the Stevedore and there was ample evidence for the jury to conclude that the shipowner was responsible for this ladder.

was bent. The accident occurred at 2:30 p.m. in the absence of any members of the ship's crew. Just before the accident occurred, Ware and Green had climbed off other containers by using the Stevedore's ladder.

When plaintiff was taken to Northwestern Memorial Hospital, it was discovered that he had suffered a broken os calsis in his right foot. He was not able to return to work until eight months later. While working as a longshoreman on another ship on November 4, 1978, he was killed. A motion for substitution of parties was granted on March 6, 1979.

Standard of Care Owed by Shipowners to Longshoremen

Defendants first argue that a motion for a directed verdict or judgment n.o.v. should have been granted under the so-called majority rule that a shipowner is not liable for injuries caused by a condition known to or open and obvious to a reasonably prudent longshoreman because shipowners need only exercise reasonable care under the circumstances to protect longshoremen against danger. This standard of care was recently adopted in *Santos v. Scindia Steam Navigation Company*, 598 F.2d 480 (9th Cir. 1979). However, this same standard of care was adopted by the district court because it employed defendants' instruction No. 29A providing as follows (Supp. App. 21-22):

> "In this case the defendant shipowner had a duty to exercise ordinary care under the circumstances to place the ship on which the stevedoring work was to be done in this instance and the equipment and appliances aboard that ship in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he might reasonably expect to encounter aris-

ing from the hazards to ship's service or otherwise, would be able, by the exercise of ordinary care, to unload the cargo in a workmanlike manner and with reasonable safety to persons and property.

"A shipowner also has a duty to give the stevedoring contractor reasonable warning of the existence of any latent or hidden danger which has not been remedied and is not usually encountered or reasonably to be expected by an expert and experienced stevedoring contractor in the performance of the stevedore work aboard the ship, if the shipowner actually knew, or, in the exercise of ordinary care under the circumstances, should have known of the existence of such danger, and the danger is one which the shipowner should reasonably expect a stevedoring contractor to encounter in the performance of the stevedoring work going on.

"A shipowner is not liable to longshoremen for physical harm caused to them by any activity or conditions on the ship whose danger is known to the longshoremen or obvious to a reasonably careful man."

In view of this instruction, we need not consider whether the shipowner was liable under the so-called minority standard of care rule that a shipowner is not liable to invitees for physical harm caused to them by any activity or condition on the ship whose danger is known or obvious to the invitees unless the shipowner should anticipate the harm despite such knowledge or obviousness.[3] As seen, the minority view was not represented in the standard of care instruction proposed by the defendants and given by the

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[3]The exception contained in this "unless" clause is taken from the Restatement of Torts (2d) § 343A. We have not decided whether this exception is the proper standard, *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 596 F.2d 746, 750 n. 16 (7th Cir. 1979), and need not so decide here.

district judge and would not in any event have been helpful to them.

Since the jurors found that defendants were liable to plaintiff under the foregoing instruction, they must have found that plaintiff's injuries were not caused by a condition known or obvious to a reasonably careful longshoreman. Also the jury specially found that plaintiff was not contributorily negligent. Accordingly, we cannot accept defendants' argument that there was no liability on the ground that the condition of the ladder was open and obvious.

Defendants insist that they were entitled to a judgment notwithstanding the verdict because a reasonable jury could only have concluded that the danger of using such a defective ladder was open and obvious. In this regard they rely heavily on *Castel v. Moller, A.P.*, 441 F.Supp. 851 (N.D. Cal. 1977). That case is distinguishable because there no inference could be drawn that the defective condition of the ladder was attributable to the shipowner rather than to the use of it by the Stevedore's employees. We cannot disturb the verdict here because there was ample evidence that the shipowner was negligent in allowing a defective ladder to be available where the Stevedore's employees were likely to make use of it. Even if the jurors believed that the condition of the ladder was open and obvious to plaintiff's co-employees and therefore that they were negligent in attempting to use it, that would not mitigate the shipowner's negligence. The Supreme Court recently made clear that the shipowner is liable for the consequences of

his negligence even if there is concurring negligence by the Stevedore and that the negligent shipowner will be held liable for all damages not due to plaintiff's own negligence. *Edmonds v. Compagnie Generale Transatlantique*, ... U.S. ....., ..., 47 LW 4868, 4871-4872.

The evidence of defendants' negligence here distinguishes the present case from *Clemons v. Mitsui O.S.K. Lines, Ltd.*, 596 F.2d 746 (7th Cir. 1979). In *Clemons* we overturned a jury verdict for the plaintiff because there the open and obvious nature of the danger (an open deep tank)—coupled with the facts that it was an expectable hazard on a ship docked for loading and was necessary to accomplish the task—established that it was not negligent for the shipowner to have the deep tanks open. Moreover, it was in accord with custom to leave tanks open when, as there, they were about to be worked. We concluded that insofar as there was evidence that it was negligent to allow the tanks to be open when they were not yet actually being worked, this negligence was not attributable to the shipowner since it had been told by the Stevedore to open the tanks so that they could be worked.

The very different argument in the present case is that even if the shipowner was negligent the responsibility for the accident should be shifted to those who used the ladder despite its open and obvious dangerousness. In view of the jury's finding that the plaintiff was not contributorily negligent and in view of *Edmonds v. Compagnie Generale Transatlantique, supra* (also discussed *infra*), this argument is untenable.

Any Stevedore's Omission Does not Immunize Defendants.

Defendants also argue that they may not be held liable because the Stevedore had control of the unloading of the ship and was responsible for providing safe ladders.[4] Under *Edmonds v. Compagnie Generale Transatlantique, supra,* and Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905(b)), the liability of the ship to a longshoreman depends on a showing of negligence on the part of the shipowner. Here the jury found that defendants were negligent in leaving an unsafe ladder in the hold for possible use by longshoremen. As previously discussed, *Edmonds* makes clear that a longshoreman can recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury even if the Stevedore was partly to blame as these defendants contend. Therefore, defendants may not escape liability on the ground that the Stevedore was negligent.

The District Court Properly Refused to Permit the Jury to Give the Shipowner an Equitable Credit for the Negligence of the Stevedore.

Defendants argue that the district court should have instructed the jury to reduce any award by the amount of the negligence of the Stevedore. However, *Edmonds v. Compagnie Generale Transatlantique, supra,* holds to the contrary, so that defendants are not entitled to a new trial on this ground.

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[4]It is undisputed that the Stevedore did supply a safe ladder to plaintiff and his co-workers. Defendants seem to suggest that the Stevedore had an obligation to assure that all ladders were blocked or held. They also presented some evidence that supervisory employees of the Stevedore were aware that plaintiff's group was using an unsafe ladder and failed to prevent that use.

Testimony of So-called Expert Witnesses Was Permissible.

Defendants assert that Judge Leighton committed reversible error by permitting Dr. Bernard Friedman, Dr. Samuel Willens and Thomas Grzesis to testify, even though their names were not disclosed in answers to defendants' interrogatories. This ruling was a fair one since the trial judge noted that counsel had been unable to agree upon a final pre-trial order and since he ruled that the defendants could call their own witnesses to rebut the proffered testimony. Therefore, no prejudice to defendants occurred, and no abuse of discretion has been shown.[5] *Mortella v. Great Atlantic & Pacific Tea Co.*, 418 F.2d 1246, 1247 (3d Cir. 1969); *Stewart v. Meyers*, 353 F.2d 691, 695-696 (7th Cir. 1965).

The Court's Instructions Were Proper.

Defendants first attack the court's instruction on causation (Supp. App. 18) which was taken from 3 Devitt and Blackmar, Federal Jury Practice and Instructions (3d ed., 1977) §§ 94.13 and 96.22 and tendered by plaintiff. Defendants admit that this instruction is typically given under the Federal Employers' Liability Act (45 U.S.C. §§ 51-59) and under the Jones Act (46 U.S.C. §§ 688) in cases involving seamen (Br. 26). Like those statutes, the Longshoremen's and Harbor Workers' Compensation Act of 1977 (33 U.S.C. § 901 *et seq.*) is a remedial statute entitled to liberal construction. The instruction which told the jury that defendants' act or omission could be considered "the

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[5]The district judge expressed clearly on the record his judgment that because of an apparent lack of communication and cooperation between counsel in this case, plaintiff's failure to supplement his answers to defendants' interrogatories to include the names of the "expert" witnesses was understandable (Tr. 243).

cause of injury or damage if the injury or damage would not have happened *but for* the act or omission" (emphasis supplied) was therefore permissible.[6] Even though the defendants also criticize the forepart of this instruction because it permitted the jury to hold defendants liable if their act or omission played any part, no matter how small, or contributed in any way in causing plaintiff his injury, that is a correct statement of the law. As the Supreme Court explained in *Edmonds, supra,* "it is true that the ship will be liable for all of the damages found by the judge or jury; yet its negligence may have been only a minor cause of the injury" (.... U.S. ...., 47 LW 4871).

The defendants also claim that the trial court should have given their two proffered instructions on proximate cause. While we agree that it would have been preferable for the court to have given these instructions, its failure to do so was not reversible error in this case. The trial judge used the expression "proximate cause" throughout his charge and the jury had responded to a special interrogatory that defendants' negligence proximately caused plaintiff's injury.[7] The concept of proximate cause is not so esoteric that it requires a special definition, at least in this case where the causal link between the defective lad-

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[6]Because the evidence showed that plaintiff's injury was caused by the condition of the ship's ladder, even if there were any error in giving the "but for" instruction on cause instead of the cause instructions suggested by defendants, it was harmless. *Farnarjian v. American Export Isbrandtsen Lines, Inc.*, 474 F.2d 361, 364 (2d Cir. 1973); *Spinks v. Chevron Oil Company*, 507 F.2d 216, 222-223 (5th Cir. 1975).

[7]It should be noted that plaintiff's counsel had no objection to defendants' proffered instructions on proximate cause because defendants' counsel had originally agreed to the "but for" instruction taken from §§ 94.13 and 96.22 of the Devitt and Blackmar set of instructions.

der and the injury was so obvious. Also, when plaintiff's counsel pointed out that defense counsel had backed down on their agreement not to oppose the "but for" instruction on cause, the district court ruled that the general subject matter was adequately covered by the "but for" instruction and added that the parties were proposing far too many instructions for the jury. (Tr. 531-532).

Next, defendants attack the trial court for giving plaintiff's instruction No. 27 providing as follows (App. 6):

> "Before the commencement of stevedoring operations, the owner of a vessel in navigable waters has a duty to take reasonable remedial action with respect to all unreasonably dangerous conditions of which it has actual or constructive knowledge. This duty of the vessel owner to take reasonable remedial action applies to all unreasonably dangerous conditions of chattels including tools and portable equipment which the owners, crew or officers of the vessel know or should reasonably expect the longshoremen to use.
>
> "After the commencement of stevedoring operations, the owner of a vessel in navigable waters has a duty to take reasonable remedial action with respect to all unreasonably dangerous conditions of which it has actual knowledge."

The substance of this charge was given in *Gallardo v. Westfal-Larsen & Co.*, 435 F.Supp. 484, 490 (N.D. Cal. 1977), was recently approved in *Santos v. Scindia Steam Navigation Company*, 598 F.2d 480, 487 n. 6 (9th Cir. 1979), and is in accord with the Longshoremen's and Harbor Workers' Compensation Act of 1977. As explained in the House Report on that statute,

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety

> because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." (3 U.S. Code Congressional and Administrative News (92nd Cong., 2d Sess., 1972) 4704.)

Furthermore, as noted *supra,* the district court gave defendants' instruction No. 29A on the standard of care, so that they may not now complain that the court inadequately instructed the jury concerning the shipowner's standard of care.

Defendants also urge that they were entitled to six one-sentence instructions. Five of them (Nos. 31A, 33, 34, 35 and 36) were refused because they were merely abstract statements taken from appellate opinions and were suitable in those cases and yet not in this. Likewise instruction No. 32 was refused because it was taken from *Marant v. Farrell Lines,* 550 F.2d 142 (3d Cir. 1977), where plaintiff was injured as a result of a condition correctible [sic] by the stevedore, so that, as Judge Leighton recognized, the tendered instruction "doesn't state the applicable rule of law to this case" (Tr. 545).

It was also appropriate for the district court to refuse defendant's proposed instruction No. 44 because it was only an excerpt from an OSHA regulation and dealt only with ladders supplied by stevedores. As the trial judge noted, that instruction was irrelevant because the plaintiff was injured by a defective ladder that the defendants left in the hold and not by any Stevedore ladder (Tr. 556).

Judgment affirmed.